

## DEPARTMENT OF STATE REVENUE

04-20150209.LOF

**Letter of Findings Number: 04-20150209**  
**Sales/Use Tax**  
**For Tax Years 2011, 2012, and 2013**

**NOTICE:** IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

### HOLDING

Without adequate supporting documentation, Contractor was required to collect sales tax or exemption certificates from customers when it performed construction work for improvement of realty on a "time and materials" basis. Without adequate supporting documentation, Contractor was responsible for sales tax or use tax on equipment and materials it purchased and used to perform work for improvement of realty on a "lump sum (non-time and materials)" basis. Contractor was also responsible for the negligence penalty.

### ISSUES

#### I. Sales/Use Tax - Imposition.

**Authority:** IC § 6-2.5-1-2; IC § 6-2.5-1-5; IC § 6-2.5-1-14.9; IC § 6-2.5-1-27.7; IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-4-1; IC § 6-2.5-4-9; IC § 6-2.5-9-3; IC § 6-8.1-5-1; IC § 6-8.1-5-4; Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); Rhoades v. Indiana Dep't of State Revenue, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); USAir, Inc. v. Indiana Dep't of State Revenue, 623 N.E.2d 466 (Ind. Tax Ct. 1993); Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974); Indiana Dep't of State Revenue v. Kimball Int'l Inc., 520 N.E.2d 454 (Ind. Ct. App. 1988); [45 IAC 2.2-3-4](#); [45 IAC 2.2-4-21](#); [45 IAC 2.2-4-26](#); [45 IAC 2.2-8-12](#).

Taxpayer protests the Department's proposed assessments on sales and use tax.

#### II. Tax Administration - Negligence Penalty.

**Authority:** IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of the negligence penalty.

### STATEMENT OF FACTS

Taxpayer, an Indiana S corporation, is an electrical and mechanical contractor doing business in Indiana and outside of Indiana. Taxpayer performs construction work and charges its customers on either a "lump sum (non-time and materials)" basis or "time and material" basis. Taxpayer also provides repair services, equipment rental, power services, energy management and various maintenance services. In addition to an Indiana Retail Merchant Certificate, Taxpayer applied for and obtained an Indiana Direct Payment Permit.

In 2014, the Indiana Department of Revenue ("Department") conducted a sales/use tax audit of Taxpayer's business records and tax returns for 2011, 2012, and 2013 tax years. Pursuant to the audit, the Department found that Taxpayer failed to maintain adequate records, including source documentation such as general ledger report, to determine if the sales tax and use tax were properly remitted to the Department. The audit concluded that Taxpayer failed to collect and remit sales tax on certain transactions in which Taxpayer transferred tangible personal property to its customers. The Department's audit also assessed use tax on the grounds that Taxpayer did not pay sales tax or self-assess and remit the use tax on certain purchases of tangible personal property, which Taxpayer used for its business.

Taxpayer protested the assessments of sales tax and use tax and submitted additional documents in support of

its protest. Upon reviewing the additional documents, the Department agreed that Taxpayer provided sufficient documents to show that it paid sales/use tax on two asset purchases (Asset Number 85645, partially, and Asset Number 604, fully). Thus, the audit assessments on these two items will be adjusted in a supplemental audit review. Taxpayer however continued to protest the remaining assessments. A hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

## **I. Sales/Use Tax - Imposition.**

### **DISCUSSION**

Pursuant to the audit, the Department found that Taxpayer performed "time and material" contracts, selling tangible personal property at retail transactions without correctly collecting the Indiana sales tax or properly signed exemption certificates. The audit discovered Taxpayer did not maintain adequate records and also some sales invoices were missing. The Department found that Taxpayer, as a contractor performing construction work on a lump sum (non-time and materials) basis, failed to self-assess and pay the use tax on its purchases of materials. Taxpayer, to the contrary, argued that it does not owe any taxes, that the audit failed to give credit for its overpayment of use tax, and that the proposed assessment is overstated.

As a threshold issue, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012). Thus, the taxpayer is required to provide documentation explaining and supporting its challenge that the Department's assessment is wrong. Poorly developed and non-cogent arguments are subject to waiver. *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012). IC § 6-8.1-5-4(a) further provides:

Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. **The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks. (Emphasis added).**

The taxpayer "must allow inspection of the books and records and returns by the department or its authorized agents at all reasonable times." IC § 6-8.1-5-4(c). "If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department." IC § 6-8.1-5-1(b). Thus, the issue is whether Taxpayer provided sufficient supporting documentation to demonstrate that the Department's proposed assessment is not correct.

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). "Retail transaction" is "a transaction of a retail merchant that constitutes selling at retail as described in IC [§] 6-2.5-4-1 . . . or . . . in any other section of [IC 6-2.5-4](#)." IC § 6-2.5-1-2(a). A person who acquires property in a retail transaction (a "purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b). The purchaser in general "shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction." *Id.* "The retail merchant shall collect the tax as agent for the state." *Id.* "A contractor is a retail merchant making a retail transaction when the contractor: (1) disposes of tangible personal property; or (2) converts tangible personal property into real property; under a time and material contract. As such a retail merchant, a contractor . . . shall collect, as an agent of the state, the state gross retail tax on the resale of the construction material and remit the state gross retail tax. . . ." IC § 6-2.5-4-9(b). Thus, unless the purchaser presents a valid exemption certificate at the time of the transaction, when the retail merchant fails to collect the sales tax, the retail merchant "is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state." IC § 6-2.5-9-3; [45 IAC 2.2-8-12](#).

Indiana also imposes a complementary excise tax called "the use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a). "Use" means the "exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a). The use tax is generally functionally equivalent to the sales tax. See *Rhoads v. Indiana Dep't of State Revenue*, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002).

By complementing the sales tax, the use tax ensures that non-exempt retail transactions (particularly out-of-state

retail transactions) that escape sales tax liability are nevertheless taxed. Rhoades, 774 N.E.2d at 1048; USAir, Inc. v. Indiana Dep't of State Revenue, 623 N.E.2d 466, 468 - 69 (Ind. Tax. Ct. 1993). The use tax ensures that, after such goods arrive in Indiana, the retail purchasers of the goods bear their fair share of the tax burden. Rhoades, 774 N.E.2d at 1050. To trigger imposition of Indiana's use tax, tangible personal property must (as a threshold matter) be acquired in a retail transaction. IC § 6-2.5-3-2(a); USAir, Inc., 623 N.E.2d at 468 - 69. A taxable retail transaction occurs when (1) a party acquires tangible personal property as part of its ordinary business for the purpose of reselling the property; (2) that property is then exchanged between parties for consideration; and (3) the property is used in Indiana. See IC § 6-2.5-1-2; IC § 6-2.5-4-1(b) and (c); IC § 6-2.5-3-2(a).

IC § 6-2.5-3-2(c) (retroactively as of January 1, 2010 and applicable to 2011, 2012 and 2013) establishes use tax liability of a contractor, as follows:

The use tax is imposed on a contractor's conversion of construction material into real property if that construction material was purchased by the contractor. However, the use tax does not apply to conversions of construction material described in this subsection, if:

- (1) the state gross retail or use tax has been previously imposed on the contractor's acquisition or use of that construction material;
- (2) the person for whom the construction material is being converted could have purchased the material exempt from the state gross retail and use taxes, as evidenced by a properly issued exemption certificate, if that person had directly purchased the construction material from a retail merchant in a retail transaction; or
- (3) the conversion of the construction material into real property is governed by a time and material contract as described in [IC 6-2.5-4-9\(b\)](#).

[45 IAC 2.2-4-21](#) specifically explains issues of a contractor's sales tax or use tax liability when the contractor performs construction work which converts tangible personal property into realty, as follows:

(a) In general, all sales of tangible personal property are taxable, and all sales of real property are not taxable. The conversion of tangible personal property into realty does not relieve a liability for any owing and unpaid state gross retail tax or use tax with respect to such tangible personal property.

**(b) All construction material purchased by a contractor is taxable either at the time of purchase, or if purchased exempt (or otherwise acquired exempt) upon disposition unless the ultimate recipient could have purchased it exempt (see 6-2.5-5 [[45 IAC 2.2-5](#)]).**

**(Emphasis added).**

[45 IAC 2.2-4-26](#) further explains in relevant part, as follows:

(a) A person making a contract for the improvement to real estate whereby the material becoming a part of the improvement and the labor are quoted as one price is liable for the payment of sales tax on the purchase price of all material so used.

(b) A person selling tangible personal property to be used as an improvement to real estate may enter into a completely [sic] separate contract to furnish the labor to install or construct such improvement, in which case the sales tax shall be collected and remitted by such seller on the materials sold for this purpose. Such sales of materials must be identifiable as a separate transaction from the contract for labor. . . .

Accordingly, for "lump sum (non-time and materials)" contracts, contractors are responsible for sales tax or use tax on the materials they purchase and use, unless their customers qualify for exemption and provide properly completed exemption certificates at the time of the transactions. Also, contractors are responsible for taxes on their purchases of tools and equipment because they are not materials incorporated into real property; rather, contractors purchase and use those items in performing their work; therefore, as the purchasers and users, they are responsible for the taxes.

In addition, for "time and materials" contracts, contractors are retail merchants and are responsible for collecting sales tax or alternatively, collecting exemption certificates, if the customers present properly signed exemption certificates. Otherwise, contractors are personally responsible for the sales tax under IC § 6-2.5-9-3. For sales and use tax purposes, a contractor is "any person engaged in converting construction material into real property on behalf of another person." IC § 6-2.5-1-14.9. Contractor may include, "but is not limited to, general or prime contractors, subcontractors, and specialty contractors." Id.

Additionally, as a general rule, all sales or purchases of tangible personal property are taxable, unless specifically exempted by statutes or regulations. [45 IAC 2.2-4-21\(a\)](#). "The conversion of tangible personal property into realty does not relieve a liability for any owing and unpaid state gross retail tax or use tax with respect to such tangible personal property." *Id.* An exemption from the use tax is granted for transactions where the sales tax was paid at the time of purchase pursuant to IC § 6-2.5-3-4 and [45 IAC 2.2-3-4](#). There are various tax exemptions available outlined in [IC 6-2.5-5](#). A statute which provides a tax exemption, however, is strictly construed against the taxpayer. *Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp.*, 310 N.E.2d 96, 97 (Ind. Ct. App. 1974). "[W]here such an exemption is claimed, the party claiming the same must show a case, by sufficient evidence, which is clearly within the exact letter of the law." *Id.* at 101 (internal citations omitted). In applying any tax exemption, the general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." *Indiana Dep't of State Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454, 456 (Ind. Ct. App. 1988).

During the audit, the Department's examiners found that Taxpayer's records showed "discrepancy" in reporting and remitting sales tax and use tax because Taxpayer failed to provide adequate source documents so the audit could not verify the amount of tax reported and remitted. As a result, the audit assessed additional sales tax and use tax for the tax years at issue based on the best information available at that time.

Throughout the tax protest process, Taxpayer stated that it decided to go "paperless" and the invoices were destroyed after they were scanned into electronic files. Nonetheless, Taxpayer argued that it was not responsible for the taxes and there was no "discrepancy" because it used "a job cost system which makes the monthly calculation for contract earnings and over/under billing" and that it was not liable for taxes on several pieces of equipment it purchased.

Accordingly, the issue is whether Taxpayer met his burden of proof to demonstrate that the Department's proposed assessment is not correct. This Letter of Findings address issues of sales tax and use tax separately as follows:

#### **A. Sales Tax**

During the tax years at issue, Taxpayer performed some contract work on a "time and material" basis. A "[t]ime and material contract" is "a contract in which the cost of construction material and the cost of labor or other charges are stated separately." IC § 6-2.5-1-27.7 (retroactively as of January 1, 2010). Taxpayer is a retail merchant under Indiana law when it performs contract work on a "time and materials" basis. Thus, when Taxpayer acts as a retail merchant making retail transactions, it was required to collect sales tax (or alternatively, properly completed exemption certificates) from customers at the time of transaction. IC § 6-2.5-2-1(b); IC § 6-2.5-4-9(b); [45 IAC 2.2-8-12\(d\)](#). As mentioned earlier, when Taxpayer failed to do so, it would be "personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state." IC § 6-2.5-9-3; [45 IAC 2.2-8-12](#).

In this instance, the audit found that "sales reports provided by [Taxpayer] indicated sales tax was underreported for the period of 2011 and 2012. . . ." The audit also noted that "several service invoices to customers in Indiana which were not included on the sales report" and that there were "gaps in the sequential ordering of the service sales invoices." The audit further noted that Taxpayer "did not provide detail for 11223 service invoices" and proceeded to assess additional sales tax "on 5[percent] of the estimated missing service invoices." The audit explained that "[t]his is the average percentage of taxable sales reported by [Taxpayer] for the audit period."

Prior to the administrative hearing, in June 2015, the auditor was asked to work with Taxpayer on this issue after Taxpayer submitted additional documents to support its protest. Subsequently, the auditor noted as follows:

The taxpayer confirmed it did not provide 8320 service invoices. The audit properly assessed sales tax on the exemption Indiana sales invoices that were not provided.

The auditor identified several sales invoices (specifically service sales invoices) where tax was not collected on the material portion of the invoice (exempt [Time and Materials] sales). The auditor requested the detail for the missing invoices so a new sales sample could be selected. The taxpayer never provided the information, rather continued to indicate the Department had a detailed listing of all the Indiana sales. . . .

The auditor, however, was not able to resolve the issues concerning the "missing invoices" with Taxpayer. As a result, the proposed assessment regarding sales tax remains unchanged.

Subsequently after the administrative hearing, Taxpayer offered additional supporting documentation, which were

contained in three compact discs and labeled "entire contents of our Service Invoice file (SV00701) for the years" at issue, to support its assertion that there was no "missing invoices."

Taxpayer stated that the three compact discs submitted now contain a total of 18,077 invoices in pdf file format. Taxpayer further explained that the complete information was never provided during the audit and was not reviewed by the Department's auditor because "[w]hen the data was originally submitted it was agreed that only invoices where Indiana Sales Tax was applicable were to be included in the invoice data file. . . ." Thus, in light of this new set of electronic data contained in the three discs, the Department's Enforcement Division is requested to conduct a supplemental audit review, examining and verifying the records now provided by Taxpayer. To the extent that the supplemental audit accepts those documents as sufficient and recalculates the sales tax due, the Department will adjust Taxpayer's sales tax liability. Otherwise, Taxpayer's protest is denied.

In short, pending supplemental audit verification, Taxpayer's protest of the imposition of sales tax is sustained.

## **B. Use Tax**

The Department assessed Taxpayer additional use tax on two grounds: (1) the audit found that Taxpayer failed to pay sales tax or self-assess use tax on several capital assets it purchased and used in performing jobs and (2) the audit determined that Taxpayer failed to remit use tax on purchases of materials which it claimed it used to perform lump sum (non-time and materials) contracts for improvement of realty without properly signed exemption certificates to support the purchases.

### **1. Assessment on Capital Assets**

Prior to the hearing, the auditor agreed to make adjustments on two asset purchases (Asset Number 85645, partially, and Asset Number 604, fully). Nonetheless, Taxpayer offered additional documentation to support that it was not responsible for the use tax on the remaining four pieces of equipment.

- 2006 CAT 420D Backhoe
- Pro Quad OTDR with Inspection
- Corealign Fusion Splicer
- 2000 Trailmobile Trailer - Delivery Charge

Upon review, however, the Department is not able to agree. Taxpayer first offered an excerpt of the signed contract and a statement from its "Equipment Manager" stating that the transaction occurred in Michigan and pursuant to the agreement, seller was responsible for tax. The information however was incomplete and could not be verified. Thus, the Department does not agree that Taxpayer met its burden. Similarly, Taxpayer offered copies of invoices on "Pro Quad OTDR" and "Fusion Splicer" without the evidence of payments, and thus the Department is not able to verify that the tax was paid at the time of the transactions. Finally, Taxpayer's documents showed that the use tax on its purchase of "2000 Trailmobile Trailer" was paid when it registered at the Indiana Bureau of Motor Vehicles. But the audit did not assess use tax on the purchase of the trailer itself; rather, the assessment was tax on the delivery charge which is taxable under IC § 6-2.5-1-5(a)(4).

### **2. Assessment on Materials Purchased**

Taxpayer further claimed that it did not owe any use tax on the materials it purchased; rather it overpaid use tax for the tax years at issue. Taxpayer maintained that the audit failed to give Taxpayer credit for some use tax it overpaid. Taxpayer further claimed that:

We showed [the auditor] that we have two accounting system: ledger type and job costing type. Our primary system is our job costing where all job cost info[rmation], customer info[rmation], tax status, job location, job cost and invoices are entered through job cost modules and you cannot get to the job and customers through account payable (where [auditor] had requested our purchase documents to be pulled from).

Taxpayer maintained that "Auditor failed to review and make connection to items on purchase . . . with the job ([Taxpayer] job number) which would have shown [Auditor] the customer exemption number or that the material was used on a job that had IST[sic] applied to the customer invoice." To support its protest, in addition to copies of various exemption certificates, Taxpayer offered an Excel spreadsheet which is similar to the audit workpapers but contains an additional column, labeled "Job Nmbr." Taxpayer's Excel information presumably suggests the connection of its "job costing type" and its purchases of materials.



Upon review, however, Taxpayer's reliance on this Excel spreadsheet information and the exemption certificates alone is misplaced. Specifically, some of the exemption certificates were not properly signed and dated. The Excel spreadsheet failed to show which exemption certificates would have supported which purchases for which jobs. In addition, Taxpayer simply listed "Job [Number]" in the Excel spreadsheet without detail explanation or source documents to support what the purported "exempt jobs" were and to account for all its purchases, exempt or otherwise. To illustrate more specifically, for example, let's assume Taxpayer purchased 100 valves and the purchase invoice showed that it did not pay tax on the purchase. Taxpayer's accounting system recorded the purchase without self-assessing tax. The Department's audit determined that Taxpayer was liable for the sales or use tax. In support of its protest, Taxpayer only listed one "Job Number" for that purchase invoice in its Excel spreadsheet. Without the source documents on the purchase invoice and the source documents concerning that "Job," exempt or otherwise, the Department is not able to verify whether Taxpayer purchased these 100 valves and subsequently sold or used the same 100 units in one transaction, or, if Taxpayer used 20 units for each of two exempt jobs, 15 units for each of three non-exempt jobs with the remaining units being unused (Taxpayer suggested during the hearing that Taxpayer sometimes discarded the remaining unused items) and therefore it was responsible for the use tax as a result.

As mentioned earlier, all purchases of tangible personal property are taxable unless specifically exempted by Indiana law. [45 IAC 2.2-4-21\(a\)](#). Taxpayer is liable for the taxes and therefore it "must keep books and records so that the department can determine the amount, if any, of [Taxpayer's] liability for that tax by reviewing those books and records. The records . . . include all source documents necessary to determine the tax. . . ." IC § 6-8.1-5-4(a). Taxpayer in this instance made a business decision to separate its records on its purchases from its sales (or use) using two different systems. It is Taxpayer's responsibility, to reconcile and track the records to properly collect the sales tax or remit use tax. Without an auditable tracking system to reconcile the records, the Department could not verify each of the purchases was properly exempt or tax was correctly remitted.

Finally, Taxpayer complained that the audit did not credit Taxpayer for use tax it overpaid. The audit explained that it did not provide credit for the difference as Taxpayer asked because "1) the taxpayer was unable to provide the detail for the use tax accrued in its software system and (2) the taxpayer's download did not include all of its purchases." Since the audit was not able to verify the proper amount of use tax due, the Department is not able to verify the overpayment of use tax, if any. During the hearing, Taxpayer did not offer any supporting documentation to support that it overpaid the use tax. Thus, Taxpayer's protest on this issue is waived and the Department must decline the invitation to address it.

In short, given the totality of the circumstances, in the absence of other verifiable supporting documentation, the Department is not able to agree that Taxpayer met its burden and that it was not responsible for the use tax.

### FINDING

Pending the supplemental audit's verification, Taxpayer's protest of sales tax is sustained to the extent that the supplemental audit revises the sales tax assessment; otherwise, Taxpayer's protest is respectfully denied.

Taxpayer's protest of the assessment of use tax is respectfully denied on all issues.

## II. Tax Administration - Negligence Penalty.

### DISCUSSION

Taxpayer requested that the Department abate the negligence penalty.

Pursuant to IC § 6-8.1-10-2.1(a), the Department may assess a negligence penalty if the taxpayer:

- (1) fails to file a return for any of the listed taxes;
- (2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;
- (3) incurs, upon examination by the department, a deficiency that is due to negligence;
- (4) fails to timely remit any tax held in trust for the state; or
- (5) is required to make a payment by electronic funds transfer (as defined in [IC 4-8.1-2-7](#)), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department.

[45 IAC 15-11-2\(b\)](#) further states:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Department may waive a negligence penalty when "the taxpayer affirmatively establishes that the failure . . . was due to reasonable cause and not due to negligence." [45 IAC 15-11-2\(c\)](#). The taxpayer "must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section." *Id.* The Department is mindful that "[r]easonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case."

Upon reviewing Taxpayer's documentation, Taxpayer failed to affirmatively establish that its failure to collect and remit sales tax was not due to negligence.

### **FINDING**

Taxpayer's protest of the negligence penalty is denied.

### **SUMMARY**

For the reasons discussed above, Taxpayer's protest of the Department's proposed assessment of additional sales tax is sustained subject to the results of the pending supplemental audit verification. The remainder of Taxpayer's protest is respectfully denied.

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